

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

VIRGINIA MALLETTE
Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

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Docket No. 17-3323

**APPELLANT'S APPLICATION FOR AWARD OF
ATTORNEY FEES AND EXPENSES**

Appellant, Virginia Mallette hereby applies to this honorable Court for an award of her attorney's fees and expenses in the amount of **\$14,007.15**. This application is made pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), and this Court's Rule 39.

I. Procedural History.

On July 12, 2017, the Board of Veterans' Appeals entered a decision that applied 38 C.F.R. § 3.156(c) to the veteran's sinusitis claim and reconsidered his original claim filed on August 22, 1995. The decision did not apply 38 C.F.R. § 3.156(c) to the veteran's prostate disorder claim. Instead, the Board used 38 C.F.R. § 3.156(a) and reopened the December 11, 2009 claim rather than his original claim filed on February 23, 1998. While the veteran's appeal was pending at the agency level, the veteran passed away and his spouse, Ms. Mallette, was substituted as the claimant. Mallette, through her lawyer (whose fees this application is concerned), appealed the Board's July 2017

decision by timely filing a notice of appeal to this Court on September 22, 2017. The lawyer entered his appearance at the same time.

This case was fully litigated but was ultimately resolved following the Court's order for supplemental briefing and oral argument when the Secretary offered a settlement via a stipulated agreement in exchange for Appellant's termination of the appeal. This Court's order granting a joint-motion to termination the appeal pursuant to the stipulated agreement and dismissing the case was dated March 11, 2019. The Court's judgment was dated April 3, 2019.

This application is timely under 28 U.S.C. § 2412(d)(1)(B).

II. Averments.

Mallette avers—

1. This matter is a civil action;
2. This action is against an agency of the United States, namely the Department of Veterans Affairs;
3. This matter is not in the nature of tort;
4. This matter sought judicial review of an agency action, namely the prior disposition of Mallette's appeal to the Board of Veterans' Appeals;
5. This Court has jurisdiction over the underlying appeal under 38 U.S.C. § 7252;
6. Mallette is a "party" to this action within the meaning of 28 U.S.C. § 2412(d)(2)(B);
7. Mallette is a "prevailing party" in this matter within the meaning of 28 U.S.C. § 2412(d)(1)(a);

8. Mallette is not the United States;
9. Mallette is eligible to receive the award sought;
10. The position of the Secretary was not substantially justified; and
11. There are no special circumstances in this case which make such an award unjust.

Mallette has attached an itemized statement of the fees and expenses for which she applies as Exhibit 1. The itemization shows the rates at which the fees and (where applicable) the expenses were calculated. Accordingly, Mallette contends that she is entitled to an award of attorney's fees and expenses in this matter in the total amount itemized.

III. Argument

The assessment of the "jurisdictional adequacy" of a petition for EAJA fees is controlled by the factors summarized and applied in, *e.g.*, *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (*en banc*).

A. "Court"

This Court is a court authorized to award attorney's fees and expenses as sought herein. 28 U.S.C. § 2412(d)(2)(F). This Court has exclusive jurisdiction of this matter. 38 U.S.C. § 7252(a).

B. Eligibility: "Party"

Mallette is a party eligible to receive an award of fees and expenses because her net worth does not exceed \$2 million. *See* 28 U.S.C. § 2412(d)(2)(B). Mallette's declaration establishes this allegation. It is attached to this application as Exhibit 2.

C. “Prevailing”

To be a “prevailing party” within the meaning of the statute, a party need only have succeeded “on any significant issue in litigation which achieve[d] some of the benefit . . . sought in bringing suit.” *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782, 791-92, 109A S.Ct. 1486, 1493, 103 L.Ed.2d 866, 876 (1989).

The “prevailing party” requirement is satisfied by the procurement of a favorable settlement. *Cullens v. Gober*, 14 Vet. App. 234, 237 (2001) (citing *Mahar v. Cagne*, 338 U.S. 122, 129, 65 L. Ed. 2d 653, 100 S. Ct. 2570 (1980)). Mallette is a “prevailing party” entitled to an award of fees and expenses because she procured a favorable settlement in which the Secretary agreed to award the complete relief sought on appeal. Mallette argued that the Board erred in failing to apply 38 C.F.R. § 3.156(c) to the veteran’s prostate disorder claim despite applying the regulation to the veteran’s sinusitis claim. She argued, *inter alia*, that had the Board applied 38 C.F.R. § 3.156(c) to the veteran’s prostate disorder claim it would have reconsidered his original claim and granted an service connection effective February 23, 1998. See Appellant’s brief at 9. The settlement agreement entered into by both parties states in relevant part:

1. Appellee agrees to assign an effective date of February 23, 1998, for Appellant’s award of service connection for a prostate disorder.
2. Appellee agrees to promptly notify the Veterans Benefits Administration (VBA) upon final disposition by the Court with respect to this settlement; and that VBA shall take prompt action to implement this agreement.

See March 8, 2019 Joint Motion at 4.

Comparing the relief sought in this matter to the relief obtained through settlement, Mallette obtained complete success in her desired objective on appeal. See *Cullens*, 14 Vet. App. at 237.

D. The Position of the Secretary Was Not Substantially Justified

To defeat this application for fees and expenses the Secretary must show that the Government's position was "substantially justified." *Brewer v. American Battle Monument Commission*, 814 F.2d 1564, 1566 (Fed. Cir. 1987); *Stillwell v. Brown*, 6 Vet. App. 291, 301 (1994) (92-205), *appeal dismissed*, 46 F.3d 1111 (Fed. Cir. 1995) (94-7090). See 28 U.S.C. § 2412(d)(1)(B). The Government must show its position to have had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 563-68, 108B S.Ct. 2541, 2549-51, 101 LEd.2d. 503-506 (1988); *Beta Systems v. United States*, 866 F.2d 1404, 1406 (Fed. Cir. 1989). "Once an appellant has alleged a lack of substantial justification, the burden shifts to the Secretary to prove that VA was substantially justified in its administrative and litigation positions." *Cullens*, 14 Vet. App. at 237. Therefore, it is sufficient for Mallette simply to aver this element.

E. Itemized Statement of Fees and Expenses

Attached as Exhibit 1 is an itemized statement of the services rendered and the fees and expenses for which Mallette seeks compensation. See 28 U.S.C. § 2412(d)(1)(B). The total attorney fee & expenses equals **\$14,007.15**.

According to the U.S. Department of Labor Bureau of Labor Statistics, the National Consumer Price Index for all Urban Consumers in the South Region, as of May

1996, the base year CPI-U was 153.220; as of February 2019 it was 243.856, a 59.15% increase. Applying this increase to the \$125.00 hourly rate provided by the Equal Access to Justice Act, the current hourly rate would be \$199.82.

Applying the rate computed above to the total time of 67.20 hours expended by counsel for Appellant, as shown in Exhibit 1, Appellant seeks a total attorney fee of **\$13,427.90**.

The lawyer has reviewed the itemization to correctly categorize each entry. The lawyer has also reviewed the itemization to exercise "billing judgment" by determining whether the activity or expense might be an overhead expense or, for any other reason, not properly billable. However, the lawyer will be grateful to have brought to his attention any mistakes which might remain.

For costs and expenses expended by counsel for Appellant, as shown in Exhibit 1, Appellant seeks a total reimbursement of **\$579.25**. Combining the total costs, expenses, and attorney fee results in a total award of **\$14,007.15**.

I declare and state under penalty of perjury under the laws of the United States of America that the information set forth in this declaration is true and correct.

/s/Adam Luck
Adam R. Luck
Attorney for Appellant
GloverLuck, L.L.P.
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com

IV. Prayer for Relief

Mallette respectfully moves for an order awarding to Appellant her attorney's fees and expenses in the amount of **\$14,007.15** to be made payable to **"Virginia Mallette C/O Adam R. Luck"**.

This application for attorney's fees and expenses is respectfully submitted for Mallette by:

/s/Adam Luck
Adam R. Luck
Attorney for Appellant
GloverLuck, L.L.P.
1910 Pacific Ave., Suite 13300
Dallas, TX 75201
Phone: 214-741-2005
Fax: 214-741-2007
Email: Adam@gloverluck.com

Submitted by e-filing submission
On April 4, 2019.

Exhibit

1

Date	Description	Total Time
7/25/2017	Received and reviewed BVA decision reopening and reconsidering the veteran's original sinusitis claim under 38 C.F.R. § 3.156(c) but only reopening veteran's prostate disorder claim under 38 C.F.R. § 3.156(a).	1.00
7/25/2017	Phone call with Appellant. First discussion regarding BVA decision, impact of decision and different treatment of the veteran's sinusitis and prostate disorder claims.	0.40
7/25/2017	Drafted notes on possible appeal of the reopening of the prostate claim. Performed initial research on 38 C.F.R. § 3.156.	1.50
8/1/2017	Phone call with Appellant to discuss theories of appeal, offer representation at CAVC; potential timeline of appeal, and viability of claim on appeal. Discussed attorney-client agreement terms/limitations/fee structure/expenses, and scope of representation at CAVC.	0.50
9/22/2017	Filed, via USPS, Notice of Appeal, Notice of Appearance, and fee agreement with CAVC. Paid the Court's \$50.00 filing fee. Sent copies of documents to Appellant.	0.30
9/27/2017	Received ECF confirmation of case filing. Phone call to Appellant to inform her the case was filed and outlined the next steps of the appeal process.	0.30
10/17/2017	Downloaded copy of BVA decision filed by VA OGC to ensure it was complete and the same as the one Appellant received from the Board.	0.00
10/19/2017	Downloaded VA OGC appearance (Anthony Ortiz), updated appellant's case file with OGC contact information	0.00
10/19/2017	Email conversation with OGC clarifying which Board decision is being appealed.	0.20
11/24/2017	Downloaded certificate of service for for RBA. It listed our previous suite number. Contacted OGC clerk for correction. Also contacted USPS to assist in ensuring delivery of the RBA to the correct address.	0.20
11/26/2017	RBA disc received, downloaded to appellant's file.	0.00
11/29/2017	Downloaded and reviewed OGC's motion to dismiss	1.00
11/30/2017	Reviewed RBA disk pages 1-1000, drafted notes on content for previously identified issues for appeal for Rule 33 memo and appellant brief. Prepared record citations with annotations of content.	4.00

12/1/2017	Reviewed RBA disk pages 1001-2000, drafted notes on content for previously identified issues for appeal for Rule 33 memo and appellant brief. Prepared record citations with annotations of content.	4.00
12/4/2017	Reviewed RBA disk pages 2001-2593, drafted notes on content for previously identified issues for appeal for Rule 33 memo and appellant brief. Prepared record citations with annotations of content.	2.70
12/4/2017	Began drafting response to OGC motion to dismiss. Drafted facts of case and researched case law regarding 38 C.F.R. § 3.156, standing issue, and case or controversy issue. Drafted clarification of facts and procedural history also drafted arguments on case or controversy issue.	3.00
12/5/2017	Finished drafting response to OGC motion to dismiss. Performed additional research on standing issue and drafted argument in response to standing and injury suffered. Final proofreading and Shepardizing.	2.00
1/17/2018	Downloaded Court's order to OGC to respond to Appellant's response to motion to dismiss.	0.10
1/31/2018	Downloaded and reviewed OGC's response to Court's 1-17-2018 order to respond.	1.00
2/7/2018	Drafted and filed response to OGC's Court-ordered response. Drafted arguments in response to jurisdictional argument and clarification of issues on appeal. Also responded to OGC's attempt to distinguish <i>Emerson</i> case.	2.00
2/8/2018	Downloaded notice of non-conforming documents regarding Appellant's response filed on 2-7-2018. Rejected the response as filed out of time.	0.00
2/9/2018	Phone call to clerk of Court regarding notice of nonconforming document. Explained that the response filed on 2-7-2018 was not the original response so it was not out of time. Clerk acknowledged the mistake and confirmed she would withdraw the notice of nonconforming documents. Clerk also advised Appellant to file a motion for leave to ensure the response is considered by the judge.	0.20
2/9/2018	Downloaded Court's order revoking previous notice of nonconforming documents.	0.00
2/9/2018	Drafted and filed motion for leave to file response to OGC's response to Court's 1-17-2018 order.	0.10

2/12/2018	Downloaded Court's order granting leave to file the 2-7-2018 response.	0.00
2/12/2018	Refiled response to response to OGC's response to Court's 1-17-2018 order.	0.00
2/15/2018	Downloaded and reviewed Court's order denying OGC's motion to dismiss. Also calendared due dates for Appellant's brief.	0.30
4/12/2018	Reviewed, filed, and calendared court order on Rule 33 CLS briefing conference.	0.00
4/29/2018	Request from OGC to reschedule CLS conference. Responded as unopposed.	0.10
4/30/2018	Email from Court to reschedule CLS conference due to a schedule change. Unopposed.	0.10
4/30/2018	Downloaded Court's order rescheduling CLS conference. Calendared new dates.	0.00
5/15/2018	Began drafting Rule 33 memo for briefing conference. Inserted law and notes from prior research on issue of application of § 3.156(c) to prostate disorder claim.	1.00
5/16/2018	Continued drafting Rule 33 memo. Added argument and facts on Board's failure to provide adequate R&B for treating sinusitis and prostate claims differently. Also added additional case law analysis of <i>Emerson</i> and <i>Blubaugh</i> . As well as discussion of new and relevant STRs that were received by the Board.	2.00
5/17/2018	Finished drafting Rule 33 memo. Final proofreading, shepardized and cite checked authority used. Attached records from RBA.	0.50
5/17/2018	Emailed Rule 33 memo to OGC and Court. Also drafted and filed certificate of service for Rule 33 memo.	0.10
6/12/2018	Rule 33 CLS conference held. OGC going to defend on all issues. No agreement reached.	0.20
6/12/2018	Phone call with Appellant regarding CLS conference and OGC's position on the issues. Discussed timeline of briefing and anticipated adjudication.	0.50
6/28/2018	Began drafting Appellant's brief. Drafted statement of the case, summary of the argument, and standard of review.	4.00
7/2/2018	Continued drafting Appellant's brief. Drafted 3.156(c) argument and application of <i>Emerson</i> , and Board's different treatment of sinusitis and prostatitis claims.	3.00

7/3/2018	Finished and filed Appellant's brief. Final proofreading and Shepardizing. Drafted certificate of service, table of contents, table of authorities, and RBA cites.	2.00
8/29/2018	Email from OGC requesting position on 45-day extension to file Appellee's brief. Unopposed.	0.10
9/3/2018	Downloaded OGC motion for extension to file Appellee's brief	0.00
9/4/2018	Downloaded Court's order granting OGC's extension to file Appellee's brief.	0.00
10/17/2018	Downloaded OGC notice of appearance (Abhinav Goel)	0.00
10/19/2018	Downloaded and reviewed Appellee's brief. Made annotations of arguments for future research and response. Looked up and reviewed cases relied on by OGC in arguments.	2.00
10/22/2018	Began drafting Appellant's reply brief. Drafted arguments in response to OGC attempts to distinguish <i>Emerson</i> . Clarified issues being claimed on appeal.	3.00
10/24/2018	Finished drafting Appellant's reply brief. Completed arguments in response to case or controversy argument. Drafted table of authorities and RBA cites. Filed with Court.	3.00
10/25/2018	Email from OGC requesting position on 45-day extension to file ROP. Unopposed.	0.10
10/26/2018	Downloaded OGC's motion for extension to file ROP	0.00
10/29/2018	Downloaded Court's order granting extension to file ROP	0.00
12/10/2018	Downloaded ROP	0.00
1/8/2019	Downloaded Court's order referring case for a panel decision.	0.00
1/16/2019	Downloaded Court's order for supplemental briefing. Calendared due dates	0.00
1/17/2019	Phone call with Appellant regarding Court's order for supplemental briefing. Discussed Court's questions and addressed new timeline.	0.60
1/23/2019	Began initial research on the three questions from the Court for supplemental briefing.	6.00
1/24/2019	Began drafting supplemental brief. Drafted responses to questions 1 and 2	4.00
1/24/2019	Consulted with additional counsel regarding questions presented for supplemental briefing.	0.00

1/25/2019	Drafted and filed <i>Solze</i> letter with attachments to Court	0.70
2/6/2019	Downloaded Court's order scheduling oral argument for 4-24-2019 at 10:00 am. Calendared date.	0.00
2/6/2019	Phone call with Appellant informing her of Court's order scheduling oral argument.	0.20
2/12/2019	Continued drafting supplemental brief. Additional research on question 3 from Court. Drafted response to question 3 and revised response to question 2.	4.00
2/13/2019	Finished supplemental brief. Final edits on responses to reduce length to required page limit. Final proofreading and Shepardizing.	1.00
2/13/2019	Phone call and email from OGC offering settlement. Offered to granted SC for veteran's prostate condition effective 2-23-1998. Also wanted to file a stay of proceedings.	0.10
2/13/2019	Phone call with Appellant about OGC's settlement offer. Discussed impact of the decision on current proceedings, potential back pay, etc. Appellant decided to move forward with the current case but wants to see settlement offer in writing.	0.80
2/13/2019	Phone call to OGC. Informed him that Appellant is unopposed to stay of proceedings but expressed concerns about any future requests for extensions given the duration of the case and OGC's repeated extension requests at every stage.	0.20
2/13/2019	Downloaded OGC motion to stay proceedings	0.00
2/14/2019	Downloaded Court's order granting stay of proceedings until 3-15-2019. Calendared new deadlines.	0.00
2/21/2019	Email conversation with OGC informing him that Appellant is rejecting the VA's offer. OGC continued to press for settlement.	0.10
2/28/2019	Email and phone call from OGC inquiring if Appellant has reconsidered settlement offer.	0.10
3/5/2019	Email conversation with OGC informing him that Appellant has accepted the settlement offer if it is revised.	0.10
3/6/2019	Phone call with OGC to discuss specifics of Appellant's issues with the settlement offer and requested revisions.	0.20

3/7/2019	Received and reviewed revised settlement offer and motion to dismiss received from OGC.	0.20
3/8/2019	Phone call with client regarding the revised settlement offer	0.50
3/8/2019	Downloaded joint motion to terminate the appeal and stipulated settlement.	0.00
3/11/2019	Downloaded Court's order granting joint motion to terminate the appeal and dismissing the case.	0.00
4/3/2019	Downloaded Court's judgment.	0.00
4/5/2019	Drafted EAJA Petition, verified fees and eliminated time that was spent on issues not appealed or dismissed, duplicative, or not a benefit to appellant. Verified costs, reviewed and finalized petition and affidavit.	1.90
Total Time		67.20

All work performed by Adam R. Luck (2013 law graduate) - Rate \$199.82

Date	Description	Total
7/17/2018	Appellant's payment of Filing Fee	\$50.00
7/17/2018	Postage for Notice of Appeal, Notice of Appearance, appellant's payment, and attorney's representation documents. Sent priority mail via USPS	\$0.70
3/11/2019	Travel cancellation expense incurred due to settlement and cancellation of oral argument. AA record YSGGYL.	\$71.30
3/11/2019	Travel cancellation expense incurred due to settlement and cancellation of oral argument. AA record XHZRRJ.	\$189.30

3/11/2019	Travel cancellation expense incurred due to settlement and cancellation of oral argument. Confirmation #155725994081.	\$267.95
Total Expenses		\$579.25

Exhibit

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**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

VIRGINIA MALLETTE

Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Appellee.

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Docket No. 17-3323

DECLARATION OF NET WORTH

Appellant, Virginia Mallette, hereby declares and states:

1. I am more than eighteen years of age, of sound mind, and fully competent to make this declaration. I have personal knowledge of the matters set forth below and they are all true and correct.
2. I am the appellant named in this appeal to the Court of Appeals for Veterans Claims (CAVC).
3. At the time this civil action was filed, my personal net worth did not exceed \$2,000,000 (two million dollars); nor did I own any unincorporated business, partnership, corporation, association, unit of local government, or organization, of which the net worth exceeded \$7,000,000 (seven million dollars) and which had more than 500 employees.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on: April 4, 2019.

Executed at: Bedford, VA

Signed:

Virginia S. Mallette
Virginia Mallette